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Informal note by the United Nations High Commissioner for Human Rights

A. Introduction and general observations

1. The United Nations High Commissioner for Human Rights is greatly encouraged by the fact that Member States have agreed to develop specific instruments on illegal trafficking and transporting of migrants (the Migrant Protocol) and on trafficking of persons (the Trafficking Protocol) under the auspices of the United Nations Convention against Transnational Organized Crime. Through the present note, the High Commissioner wishes to convey her concern about the issues those instruments are attempting to address as well as a number of comments regarding certain aspects of the two draft texts (A/AC.254/4/Add.1 and A/AC.254/4/Add.3/Rev.1). The note includes some general recommendations that the High Commissioner is willing to develop further should this be requested.

2. The High Commissioner also draws the attention of Member States to the separate, detailed analysis of the Trafficking Protocol prepared for their consideration by the United Nations Special Rapporteur on violence against women, its causes and consequences (A/AC.254/CRP.13). While that document does not necessarily reflect the position of the Office of the United Nations High Commissioner for Human Rights, the High Commissioner wishes to recall the fact that the Special Rapporteur was appointed by the Commission on Human Rights in 1994 to study the issue of violence against women—which the Special Rapporteur (reflecting the position taken by the General Assembly in article 2 of its Declaration on the Elimination of Violence against Women (resolution 48/104)) has found to include the phenomenon of trafficking as it affects women and girl-children.

3. The High Commissioner is aware that the instruments under development are not human rights treaties but more in the nature of transnational cooperation agreements with a particular focus on organized crime. However, it is important that new international instruments do not conflict with or otherwise undermine international human rights law.

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It is the High Commissioner's view that certain aspects of the two draft Protocols raise some concerns, which are set out briefly below.

B. Draft Protocol against Illegal Trafficking and Transport of Migrants Supplementing the United Nations Convention against Transnational Organized Crime

1. The rights of irregular or illegal migrants

4. The vulnerability of migrants, in particular irregular or illegal migrants, as a result of their precarious situation in society often leads to violation of their most basic human rights. The present draft Protocol focuses on migrants who are or have been the victims of criminal exploitation in their countries of origin and/or transit countries and/or countries of reception. That status renders such persons even more vulnerable to further exploitation and violation of their rights.

5. It is the High Commissioner's view that any instrument dealing with this issue—irrespective of its perspective—must commit itself to preserving and protecting the fundamental rights to which all persons, including illegal migrants, are entitled. Respect for basic rights does not, of course, prejudice or otherwise restrict the sovereign right of all States to decide who should or should not enter their territories.

2. The need to include a protection provision in the Protocol

6. Despite the acknowledgement in the preamble to the draft Protocol that "*illegal trafficking and transport of migrants is a particularly heinous form of transnational exploitation of individuals in distress*", the Protocol itself contains no protection principle. In addition to its negative impact on trafficked migrants, a neglect of victim issues may well compromise the effective implementation of this instrument. The High Commissioner urges that consideration be given to inserting a provision to the effect that Member States are under an obligation to ensure respect for and protection of the rights of illegal migrants, which are owed to them under applicable international law. Such a general provision could be strengthened through reference to the core rights to which irregular or illegal migrants are entitled, including the right to life; the prohibition of torture and cruel, inhumane or degrading treatment or punishment; and the principle of non-discrimination.

3. The need to address the issue of detention

7. Irregular or illegal migrants who are detained by the receiving State have a recognized right under international law to be treated with humanity and dignity—both before and after a determination is made concerning the lawfulness of their detention. The practical importance of this right justifies a direct and specific reference in the Protocol.

4. The need to protect asylum seekers who are also irregular or illegal migrants

8. The High Commissioner draws attention to the fact that increasing numbers of asylum seekers—including those with genuine claims to refugee status—are being transported by means that would be covered in the present Protocol. The principle of *non-refoulement*, which is the core of international refugee protection and which is recognized as a norm of customary international law, must be preserved in this instrument. The High Commissioner strongly advocates the insertion of a provision to the effect that the

illegality of an individual's entry into a State will not be a factor adversely affecting that person's claim for asylum. In order to make such a provision effective, signatories should be required to ensure that illegal migrants coming within the scope of this instrument are given full opportunity (including through provision of information) to make a claim for asylum or to present any other justification for remaining in the country and that such claims be considered on a case-by-case basis.

5. Prostitution and sexual exploitation

9. The reference in the present preamble to prostitution and sexual exploitation is not followed up in the draft.

6. A savings clause

10. Consideration could be given to inserting a savings clause such as the one contained in article 15 of the draft Trafficking Protocol.

C. Draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children [Persons], Supplementing the United Nations Convention against Transnational Organized Crime

7. Importance of this Protocol

11. The observations of the High Commissioner in relation to this Protocol stem in part from an understanding of the potential significance of this instrument. As noted in the Preamble, there is as yet no universal instrument that addresses all aspects of trafficking in persons. In fact, "trafficking" has never been precisely defined in international law and the most recent international instrument dealing with trafficking and related issues is now more than half a century old.

8. Definition of trafficking

12. From this perspective the High Commissioner generally welcomes the approach to defining "trafficking" as reflected in option 1 of article 2. A broad and inclusive definition is vital to ensuring the present and continuing relevance of this instrument. In this respect it is relevant to note that the methods by which and the purposes for which individuals are trafficked are constantly changing. While the draft definition does recognize that trafficking takes place for reasons beyond forced prostitution (reference to "sexual exploitation"), it limits other purposes of trafficking to "forced labour". A preferable and more accurate description of purposes would include reference to forced labour and/or bonded labour and/or servitude. (The term "servitude", when used in this context, should be understood to include practices that have been defined elsewhere as "contemporary forms of slavery", such as forced prostitution.) Such a reference would be consistent with existing international law (see, for example, article 8 of the International Covenant on Civil and Political Rights) (see resolution 2200 A (XXI), annex). It would also serve to avoid the implementation difficulties inherently associated with undefined, imprecise and emotive terms such as "sexual exploitation" when used in connection with adults.

9. Definition of trafficking in children

13. For reasons of clarity, the High Commissioner suggests that the definition of trafficking in children be dealt with in a separate section. This section should also include an acknowledgment that children have special rights under international law and that child victims of trafficking have special needs that must be recognized and met by States parties.

14. Consistency with current international law requires that the "child" be defined as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier" (article 1 of the Convention on the Rights of the Child (resolution 44/25, annex)). When defining the purposes for which children are trafficked, reference should be made to both sexual and economic exploitation. The High Commissioner urges inclusion of specific reference to the Convention on the Rights of the Child, which deals with both economic exploitation (article 32) and sexual exploitation (article 34). It should also be noted that the overwhelming majority of States are already under an existing legal obligation to take measures "to prevent the abduction of, the sale of or traffic in children for any purpose or in any form" (article 35).

10. The need to ensure respect for the principle of non-discrimination

15. The principle of non-discrimination is a fundamental rule of international law and one of particular relevance to the situation and vulnerabilities of irregular or illegal migrants. The High Commissioner is of the view that the Protocol should contain a broad non-discrimination provision. The non-discrimination clause in the Rome Statute of the International Criminal Court (A/CONF.183/9, article 21, para. 3) would appear to be a useful model for such a provision.

11. Assistance for and protection of victims of trafficking

16. The High Commissioner has noted with concern that despite the commitment contained in the Preamble to this instrument, the victim protection and assistance provisions of the draft Protocol are very weak. As a general observation, the High Commissioner notes that under the present draft text, victims of trafficking would appear to gain very little from cooperating with national authorities in the prosecution of traffickers. Assistance and protection provisions must, at a minimum, meet basic international human rights standards. From this perspective, specific reference should be made to adequate housing, appropriate health care and other necessary support facilities.

17. Assistance and protection provisions should also take account of the fact that trafficked persons are usually in an extremely vulnerable situation and may be subject to reprisals from traffickers. In addition, it should be noted that trafficked persons are often subject to detention and prosecution for offences related to their status (including violation of immigration laws, prostitution, etc.). States parties should be directed to refrain from detaining or prosecuting trafficked persons for such status-related offences.

18. The requirement of States parties to maintain the confidentiality of legal proceedings relating to trafficking in persons (draft article 4, paragraph 1) should not be limited to "appropriate cases and to the extent possible under domestic law". The right to privacy is enshrined in international human rights law and its protection is especially important in the situations covered by this Protocol where the continued safety of the trafficked person must be a primary consideration.

19. The wide discretion implicit in the use of the term "in appropriate cases" in paragraph 2 of draft article 4 should also be restricted. Once a determination is made that an individual is a trafficked person to which this Protocol applies, then the provision of information with regard to court and administrative proceedings; assistance to enable their views and concerns to be presented and considered; and housing, education and care for children should not be dependent upon a further subjective determination of "appropriateness".

12. Status of the trafficked person/return of victims of trafficking

20. The High Commissioner is of the view that safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons. A failure to include provision for safe and (to the extent possible) voluntary return would amount to little more than an endorsement of the forced deportation and repatriation of victims of trafficking. When trafficking occurs in the context of organized crime, such an endorsement presents an unacceptable safety risk to victims.

21. At a very minimum, the identification of an individual as a trafficked person should be sufficient to ensure that immediate expulsion that goes against the will of the victim does not occur and that the expanded protection and assistance provisions of the Protocol suggested above become immediately applicable. The High Commissioner urges Member States to consider a provision whereby trafficked persons are provided with the option of at least temporary residence. In addition to providing a measure of safety, such a provision would encourage victims of trafficking to cooperate with the authorities and thereby contribute to achieving the law enforcement objectives of the Protocol. It is important in this context to note that victim protection must be considered separately from witness protection, as not all victims of trafficking will be selected by investigating and prosecuting agencies to act as witnesses in criminal proceedings.

13. Victim rehabilitation

22. The High Commissioner considers that the limitation of "in appropriate cases" in draft article 7 is unnecessarily restrictive and not in accordance with international human rights law, which clearly provides that victims of human rights violations such as trafficking should be provided with access to adequate and appropriate remedies. The present paragraph 1 of article 7 could be strengthened through insertion of a general provision obliging States parties to provide information to trafficking victims on the possibilities of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subject, and to render reasonable assistance to such victims to enable them to obtain the remedies to which they are entitled under national law.

23. The obligation upon States to consider implementing measures "to provide for the physical, psychological and social recovery of victims of trafficking" should be made more precise. The High Commissioner suggests the insertion of a provision to the effect that States Parties are to take steps (both individually and through international assistance and cooperation) to provide for the physical, psychological and social recovery of victims of trafficking.

24. Finally, the High Commissioner notes that the term "rehabilitation" as used in international legal texts is generally reserved for offenders. The terms used in the Basic Principles of Justice for Victims of Crime and Abuse of Power (see resolution 40/34,

annex)—victim "restitution", "compensation" and "assistance"—would be much more appropriate in this context.

14. Prevention of trafficking

25. The High Commissioner draws attention to the fact that national anti-trafficking measures have been used in some situations to discriminate against women and other groups in a manner that amounts to a denial of their basic right to leave a country and to migrate legally. Draft article 12 could usefully include a provision to the effect that actions aimed at preventing trafficking should not have discriminatory effects or infringe upon the right of an individual to leave her or his country or legally to migrate to another.

D. Relation between the two protocols

Ensuring consistency between the two protocols and avoiding conflicts in application

26. The High Commissioner endorses the concept of developing two Protocols dealing with illegal migration and trafficking, respectively. There is, however, a need to ensure consistency between the two instruments and to avoid conflict in their separate and joint application.